

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNAL JAMES ELAM,

Defendant-Appellant.

UNPUBLISHED

October 14, 2003

No. 240595

Macomb Circuit Court

LC No. 01-000922-FH

Before: Kelly, P.J. and Cavanagh and Talbot, JJ.

MEMORANDUM.

Defendant appeals as of right his jury trial conviction of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim between age thirteen and sixteen). Defendant was sentenced to 114 months to 15 years in prison for each conviction. We affirm.

Defendant argues that he was denied a fair trial and the burden of proof was impermissibly shifted because the prosecutor improperly referred to defendant's parole officer in opening statement although defendant was not on parole and did not have a parole officer. We disagree.

We review "de novo allegations of prosecutorial misconduct." *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003).

Having thoroughly reviewed the record, we find that defendant was not denied a fair trial nor was the burden of proof improperly shifted to defendant. Immediately after the prosecutor uttered the inaccurate remark, defense counsel objected and the trial court excused the jury. The prosecutor admitted that he had misspoken, intending to say probation officer instead of parole officer. The trial court instructed the jury that the prosecutor had misspoken and defendant was never on parole and did not have a parole officer. The prosecutor made no further mention of

either a parole officer or a probation officer at any point during trial. The trial court again instructed the jury before deliberations that the attorneys' statements and arguments are not evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Because the prosecutor made no further mention of a parole officer and the trial court adequately instructed the jury, we find that defendant was not denied a fair trial nor was the burden of proof impermissibly shifted to defendant.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Michael J. Talbot